In the Supreme Court

OF THE

United States

OCTOBER TERM, 1963

No. 209

JOSEPH LYLE STONER, *Petitioner,*

vs.

CALIFORNIA, *Respondent.*

On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

The respondent, the People of the State of California, respectfully petitions under Rule 58 for a rehearing by this Honorable Court of the above-entitled cause.

PRELIMINARY STATEMENT

Respondent respectfully urges this Court in considering this Petition for Rehearing to consider the fact that this case was placed on the summary calendar for oral argument. There is no doubt that this course was indicated by the opinion of the District Court of Appeal and the attack upon that opinion in the opening brief of petitioner. But the issues decided by this Court were not framed until the filing of respondent's brief and petitioner's reply brief. At this point we respectfully submit that the issues framed required more than 30 minutes for treatment at oral argument. Noteworthy is the fact that respondent was unable, because of the time limitations, to make more than a cursory reference to the question of prejudicial error at the oral argument.

I

THE OPINION OF THE COURT CREATES CONFUSION IN THE LAW OF SEARCH AND SEIZURE APPLICABLE TO THE STATES BECAUSE IT APPEARS TO FASTEN THE "MERE EVIDENCE" RULE UPON THE STATES

Even though the point was plainly in issue and fully briefed by both sides, the question of whether the "mere evidence" rule is to be applied to the states was not clearly decided by the opinion in this case. Footnote 4 seemingly fastens this doctrine to the states, but does so without discussion of the relevant historical and policy considerations, and without distinguishing between this Court's supervisory powers over federal courts and constitutional principle binding on the states.

Furthermore, without discussion or consideration of the possible impact, the language of the footnote casts doubt on the California statute which permits a search warrant to issue for the seizure of ". . . any evidence which tends to show a felony has been committed or tends to show that a particular person has committed a felony." Cal. Pen. Code § 1524, subdiv. 4. This section was based upon Chapter 263.02 of the Wisconsin Statutes and is in accordance with the Uniform Law of Arrest. We submit that to allay confusion on this point an unequivocal decision is required.

II

IN ITS TREATMENT OF THE ISSUE OF ACTUAL AUTHORITY TO CONSENT TO A SEARCH, THE OPINION PURPORTS TO DECIDE A QUESTION OF CALIFORNIA LAW WHICH IS UNSETTLED AND RELIES UPON LANGUAGE FROM A CASE WHICH IS DICTUM AND OUT OF CONTEXT

In the opinion, the statement is made that ". . . there is no intimation in the California cases cited by the respondent that California has [a law giving a hotel proprietor blanket authority to authorize the police to search rooms of the hotel's guests]." *Stoner v. California,* ___ U. S. ___ (1964). It is plain that this question was not settled, but nevertheless the Court's opinion purports to interpret California cases and decide a question which is essentially one requiring interpretation of California law. We suggest that the better and proper course would have been to remand the case to the California courts to allow them to decide this issue. This question has never been treated by the District Court of Appeal below.

Moreover, the language of the *Burke* case cited in Footnote 7 is mere dictum and has been excerpted out of context. That language was unnecessary to the decision reached in that case. The sentence following the one quoted plainly shows the context of the language used. That sentence states:

> "Therefore, proof that the police were let in by the manager, *without more*, cannot satisfy the burden upon the prosecution to show that the officers reasonably believed in good faith that they had the consent of an authorized person. (*People v. Roberts, supra,* 47 Cal.2d 374, 377.) There is *no other evidence* in the record tending to show such belief on the part of the officers." (Emphasis added.) *People v. Burke,* 208 Cal. App.2d 149, 160, 24 Cal.Rptr. 912 (1962).

When viewed in its entirety, we submit the language quoted is inapposite to this issue.

III

IN REJECTING THE CALIFORNIA DOCTRINE OF APPARENT AUTHORITY TO CONSENT TO A SEARCH, THE OPINION OF THIS COURT IGNORES THE PRINCIPLES OF FEDERAL-STATE RELATIONSHIPS ANNOUNCED IN KER v. CALIFORNIA; DOES NOT CONSIDER THE RELEVANT POLICY BASIS FOR THIS RULE; AND ANNOUNCES A RATIONALE IN REJECTING THIS RULE WHICH CASTS DOUBT ON OTHER ESTABLISHED RULES OF SEARCH AND SEIZURE IN JOINT OCCUPANCY CASES

In reliance upon this Court's statement in *Ker v. California,* 374 U.S. 23 (1963), that the states were free to develop "workable rules" of search and seiz-

ure so long as they were not in conflict with the Fourteenth Amendment's proscription of unreasonable searches and seizures, respondent urged this Court to consider the California apparent authority rule as a justification for a search and seizure in this case. Without considering the case in the context of the concepts of federalism announced in *Ker v. California, supra*, the opinion of the Court not only rejects the application of the doctrine to this case, but rejects the doctrine altogether as "unrealistic" on the theory that technicalities of the law of agency have no place in a law of search and seizure. Additionally, it is said only a person whose right is at stake can waive the right.

We note that no consideration is given to the basis for this California rule. The rationale of the rule was stated by Mr. Justice Traynor in the case of first impression on this point in California. In *People v. Gorg*, 45 Cal.2d 776, 783, 291 P.2d 469 (1955), Justice Traynor wrote:

> "In this proceeding we are not concerned with enforcing defendant's rights under the law of trespass and landlord and tenant, but with discouraging unreasonable activity on the part of law enforcement officers. 'A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule.' (Mr. Justice Stone in *McGuire v. United States*, 273 U.S. 95, 99 [47 S.Ct. 259, 71 L.Ed. 556]), and when as in this case the officers have acted in good faith with the consent and at the request of a home owner in conducting a search, evidence

so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority."

Furthermore, the opinion of the Court demonstrates a misunderstanding of the California rule. The rule does not require that police officers have a basis to believe that a night clerk or other employee of a hotel has been given authority to permit the police to search. Rather, the rule requires only that the total circumstances known to the officer be such that he reasonably believe the person authorizing the search has the authority to do so. Thus, whether the hotel clerk had been authorized by petitioner to permit a search, while plainly to be considered as a factor in assessing the officers' reasonable belief, should not be the dispositive factor.

Additionally, the waiver argument advanced in striking down the "apparent authority" rule casts grave doubt upon other settled rules of search and seizure involving consent by a joint occupant. Thus, if a person must "waive by word or deed, either directly or through an agent," his right to be free from an unreasonable search and seizure, then the well settled line of cases in which a husband or wife, a joint tenant, a relative, or other person jointly occupying premises has been allowed effectively to consent to a search and seizure must be considered to have been overruled by this opinion. See generally Anno., 31 A.L.R.2d 1078 (1953).

IV

THE COURT'S OPINION APPEARS TO ANNOUNCE A RULE REQUIRING AUTOMATIC REVERSAL OF CASES WHERE ILLEGALLY OBTAINED EVIDENCE IS RECEIVED IN A CRIMINAL PROSECUTION; THIS IS A STRICTER RULE THAN THAT WHICH HAS BEEN APPLIED IN FEDERAL CASES

After concluding that the search in this case was unlawful, the Court's opinion cryptically states, "[s]ince evidence obtained through the search was *admitted* at the trial, the judgment must be reversed. *Mapp v. Ohio,* 367 U.S. 643.'" (Emphasis added.) *Stoner v. California,* ..... U.S. ..... (1964). As thus stated, the opinion appears to announce that in every case where illegally obtained evidence is received, the fact of "admission" compels reversal of the judgment.

The footnote reference which follows this statement does nothing to dispel this inference. In the footnote the "contributed to the conviction" test of *Fahy v. Connecticut,* 375 U.S. 85, 86 (1963) is cited, and it is stated that the evidence must have "contributed" because it undoubtedly influenced the jury's determination of the credibility of the witnesses. The "contributed to the conviction" test appears to announce no more or less than that if the illegally obtained evidence was relevant and material, *i.e.,* the criteria of admissibility, then a reversal of the judgment must follow. If this is to be the rule, then we ask that the Court unmistakably announce it as such.

For the appellate courts of this State are commanded by the California constitution not to reverse

a judgment except where a "miscarriage of justice" has occurred. Cal. Const., Art. VI, § 4½. This State constitutional command has been applied by the California Supreme Court to a case where illegally obtained evidence was received. *People v. Parham*, 60 A.C. 333, 33 Cal.Rptr. 497 (1963). Thus, the appellate courts of this State must apply a rule of prejudicial error in cases of illegally obtained evidence.

In the event the opinion in this case is intended to strike down these principles of prejudicial error as repugnant to the Fourteenth Amendment, then we request that this Court do so expressly and allay the confusion which will surely follow in the wake of this decision and *Fahy v. Connecticut, supra.*

That confusion has previously existed is apparent from the conflict in the decisions of the lower federal courts. The following cases have applied the prejudicial error rule: *United States v. McCall*, 291 F.2d 859, 860 (2d Cir. 1961); *Woods v. United States*, 240 F.2d 37, 40 (D.C. Cir. 1956), cert. denied, 353 U.S. 941 (1957); *Bilodeau v. United States*, 14 F.2d 582, 585 (9th Cir. 1926), cert. denied, 273 U.S. 737 (1926) (alternative holding); cf. *Fitter v. United States*, 258 Fed. 567, 573-75 (2d Cir. 1919). In these cases the prejudicial error rule was held inapplicable: *Williams v. United States*, 263 F.2d 487, 490, 491 (D.C. Cir. 1959); *Bynum v. United States*, 262 F.2d 465, 468-69 (D.C. Cir. 1958); *Honig v. United States*, 208 F.2d 916, 921 (8th Cir. 1953); cf. *Billeci v. United States*, 290 F.2d 628 (9th Cir. 1961).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that a rehearing be granted in this case to clear up confusion engendered by the opinion heretofore issued, and to allow for a more thorough consideration of the issues ultimately framed in this case.

Dated, San Francisco, California,
April 23, 1964.

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